IN THE

Supreme Court of the United States

October Term, 1976

No. 76-516

LUCIO P. SALVUCCI,

Petitioner,

—versus—

THE NEW YORK RACING ASSN., INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, ROOSEVELT RACEWAY, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Opinions Below

The Memorandum or Decision and Order dated December 2, 1975, of the United States District Court for the Eastern District of New York (Petition at 2a-5a) has not been reported. The Order of the United States Court of Appeals for the Second Circuit is dated April 21, 1976, (Petition at 6a and 7a). Appellant's Motion for Rehearing was denied by the United States Court of Appeals for the Second Circuit.

Jurisdiction

Jurisdiction as set forth by Petitioner is contested. "Section 38 (117) of Title 17 U.S.C." and "Section 38 (114)" relied upon by Petitioner are non-existent. However, this Court does have jurisdiction under 28 U.S.C. Section 1254(1).

Question

Whether an idea is subject to copyright protection under the provisions of the Copyright Law of the United States Title 17 U.S.C.

Statement

This litigation is founded on a complaint that alleges ownership of copyrights to ideas for two complicated but unpatented betting systems titled "TRI-3 DOUBLE" and "TRI-3" (Petition at first two-thirds of page 9a).

In his complaint, plaintiff made allegations against all of the named defendants collectively without any regard to the differences that exists between the defendants or in the prior relationship of any of such defendants with plaintiff. For example, although petitioner alleges a prior relationship with the defendant, New York Racing Association, Inc. (Petition at 1a), he fails to point out to the Court that he had no such relationship with the defendant, Roosevelt Raceway, Inc. The result is to mislead the Court into believing that all defendants are in equal relationship with the petitioner when, in fact, they are not.

Defendant, Roosevelt Raceway, Inc., moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Defendant Roosevelt Raceway, Inc. further moved for summary judgment on the ground there is no material triable issue of fact. Both motions by Defendant Roosevelt Raceway, Inc. were granted by the Trial Court who stated, "The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection." (Petition at 3a).

The Trial Court further stated (Petition at 4a and 5a):

> "It is the manner of expressing and not the idea itself which is copyrightable. L. Ratlir & Son, Inc. v. Jeffrey Synder, d/b/a J.S. and Etna Products Co., Inc. No. 75-7308 (2d Cir., October 24, 1975); Roth Greeting Cards v. United Car Co., 429 F.2d 1106 (9th Cir. 1970); Welles v. Colombia Broadcasting System, Inc., 308 F.2d 810 (9th Cir. 1962). The instant copyrights attempt to protect the method of betting and are invalid."
>
> "Plaintiff's copyrights were held invalid in Salvucci v. New Hampshire Jockey Club, No. 75-223 and 75-224 (D.N.H. October 6, 1975). The court is advised that the decision is on appeal."
>
> "Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants."
>
> "The limited copyright of the expression of the methods of betting was not infringed. Defendants' motions are in all respects granted, and it is SO ORDERED."

The judgment of the District Court for the Eastern District of New York was affirmed by the United States Court of Appeals for the Second Circuit (Petition at 6a and 7a). A Motion for Rehearing brought by the Appellant was denied by the United States Court of Appeals for the Second Circuit (Petition at 8a).

In unreported cases filed by the same plaintiff against New Hampshire Jockey Club, Inc., et al., Nos. 75-223 and 75-224 (D.N.H. October 6, 1975) similar motions of the defendants were granted by the District Court who said:

> "It has long been established that ideas cannot be protected by copyright."

The United States District Court for the District of New Hampshire was affirmed by the "Per Curiam" Memorandum and Order of the United States Court of Appeals for the First Circuit on March 1, 1976, and reported at 530 F.2d 1962 (1st Cir. 1976).

In the New Hampshire case, the plaintiff Salvucci petitioned this Court for a Writ of Certiorari. The petition was denied by this Court on October 4, 1976.

ARGUMENT

The decisions of the United States District Court for the Eastern District of New York and of the United States Court of Appeals for the Second Circuit are correct. They are in conformance with the same decisions made by the United States District Court for the District of New Hampshire and of the affirming opinion of the United States Court of Appeals for the First Circuit. The denial of the present plaintiff's petition for a Writ of Certiorari in his New Hampshire cases was without error and should be so followed in the present case.

Contrary to petitioner's contention, the United States District Court for the Eastern District of New York granting defendant's two motions and the affirmance of such decisions by the United States Second Circuit Court of Appeals, does not conflict with the copyright laws. In the present case, it is obvious that although the plaintiff may claim a copyright to a written work, he does not have a claim against the defendant Roosevelt Raceway, Inc. upon which relief can be granted. This decision by the District Court and its affirmance by the Second Circuit Court of Appeals does not raise any conflict with the copyright laws. At the same time, it is also true that there exists no material issue of fact upon which this case should go forward since plaintiff's copyrighted expression is not used by the defendant Roosevelt Raceway, Inc.

Plaintiff's citation of an alleged instance of access to his work by one of the named defendants cannot be imputed to the defendant Roosevelt Raceway, Inc. Yet, this is the gist of plaintiff's contention. He contends that because one respondent allegedly had access to his copyrighted work, all defendants-respondents had access to such work. Significantly the plaintiff has made no allegation that the defendant Roosevelt Raceway, Inc. had any access to the alleged copyrighted work or that such defendant uses or in any manner infringes upon such work.

It is clear that in an action for copyright infringement, plaintiff is required to show access to the alleged copyrighted work. In the absence of a showing of such access, a claim for copyright infringement cannot be sustained. *Christie* v. *Cohan*, C.C.A. N.Y. 1946, 154 F.2d 827, *cert. den.*, 67 S. Ct. 97, 329 U.S. 734, 91 L.Ed. 634; *Remick Music Corp.* v. *Interstate Hotel Co. of Nebraska*, D.C. Neb. 1944, 58 F. Supp. 523, *Aff'd*, 157 F.2d 744,

cert. den., 67 S. Ct. 622, 329 U.S. 809, 91 L.Ed 691, *rehearing den.*, 67 S.Ct. 769, 330 U.S. 854, 91 L.Ed. 1296.

Plaintiff's copyrighted works describe ideas of wagering all of which are old and in public domain. Title 17 U.S.C. Section 8 states:

> "No copyright shall subsist in the original text of any work which is in the public domain . . ."

Although publications describing a sport or a game may themselves be subject to copyright protection, there is no protection for the specific sport or game that is already in public domain. To grant such protection would give to the author of the publication a monopoly on such game or sport beyond the protection that he should be afforded for such published work. *Briggs* v. *New Hampshire Trotting and Breeding Association, Inc.*, 191 F. Supp. 234 (D.N.H. 1960). This is especially true for a game or sport that is disclosed to the public without the benefit of patent protection. *Affiliated Enterprises* v. *Gruber*, 86 F.2d 958, 961 (1st Cir. 1936); *Seltzer* v. *Sunbrock*, 22 F. Supp. 621, 630 (S.D. Cal. 1938).

The mere idea of wagering as suggested in plaintiff's copyrighted work is not and cannot be the subject of copyright nor is it protectible as such. *Baker* v. *Selden*, 101 U.S. 99 (1880).

Perhaps the simplest and most succinct statement of the law pertaining to the present case is found in *Dorsey* v. *Old Surety Life Insurance Company*, 98 F.2d 872, 873 (10th Cir. 1938) where the United States Tenth Circuit Court of Appeals said:

> "The right secured by a copyright is not the right to the use of certain words nor the right to employ ideas expressed thereby. Rather, it is the right to that arrangement of words which the author has selected to express his ideas."

It is clear that defendant Roosevelt Raceway, Inc. has not infringed upon the limited expressions of the copyright claimed by plaintiff. Accordingly, the decision of the lower courts should not be disturbed absent proof of access by defendant Roosevelt Raceway and its use of plaintiff's copyrighted work.

CONCLUSION

It is respectfully submitted that this petition for a Writ of Certiorari be denied as in the similar case involving the same plaintiff petitioner Salvucci v. New Hampshire Jockey Club, Inc., et al.

Respectfully submitted,

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